Decision **DRAFT DECISION OF ALJ O'DONNELL** (Mailed 3/5/2002)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of FirstWorld Anaheim(U-5702-C) to Withdraw From Local Exchange Service.	Application 01-05-022 (Filed May 9, 2001)

O P I N I O N

I. Summary

In this application, FirstWorld Anaheim (Applicant) requests authorization to withdraw from the provision of local exchange service, and to transfer its customers to the customer's choice of carrier. We find that Applicant effectively withdrew from providing service to its customers, without prior Commission authorization, through the use of false and misleading notices and unauthorized service interruptions, in violation of General Order (GO) 96-A, Section XIV, Pub. Util. Code § 702, and its tariffs. By this order, we approve Applicant's request to withdraw from providing service, impose an $18,000 fine, and require reparations to customers.

II. Background

In Decision (D.) 96-11-011 and D.97-02-039, the Commission authorized Applicant, a California corporation, to provide facilities-based and resold local exchange and interexchange service. Applicant has provided local exchange service as a competitive local carrier since 1997. On May 9, 2001, Applicant filed this application requesting authority to withdraw from providing local exchange service, and to relinquish its Certificate of Public Convenience and Necessity

(CPCN). At that time, it had approximately 124 customers all of whom were business customers.

III. Representations of Applicant

Applicant says that its local exchange operations are unprofitable. Therefore, Applicant requests authorization to withdraw from providing local exchange service.

Applicant provided written notice to its affected customers on April 3, 2001, at the same time it filed an advice letter to discontinue providing interexchange service.[1] The notice stated that effective May 15, 2001, Applicant would no longer be providing local exchange service in the customers' area. Applicant enclosed a list of other providers in the area and offered its service representatives' help to assist in the transition. On May 15, 2001, after this application was filed, Applicant provided a second written notice. The notice was identical to the first except that it changed the date of discontinuance to June 16, 2001 and provided a different list of potential providers.

As of July 16, 2001, only three customers remained. The three remaining customers, after receiving two written notices and numerous phone calls, had their service suspended (except 911 and 611) for part of a day, on or about June 28, 2001. Upon the temporary suspension, Applicant notified these customers that once they called back with a service order from another carrier, it

[1]On April 3, 2001, Applicant filed Advice Letter 84 requesting authority to withdraw from providing local exchange and interexchange service. Interexchange carriers are allowed to file an advice letter to withdraw from providing interexchange service. However, local exchange carriers must file an application to withdraw from providing local exchange service. Therefore, on April 16, 2001, Applicant supplemented Advice Letter 84 by Advice Letter 84-A that revised the filing to address only interexchange service.

would reinstate full service until their chosen carrier could install their service. These three customers then placed orders with other carriers, and Applicant restored service until their new carriers could provide service.

IV. Notices

The notice requirements for transfers of a carrier's customer base were developed in D.97-06-096 for advice letter filings. The requirements are useful as a guide in this proceeding. They are as follows:

1. The notice must be in writing;
2. The carrier must provide the notice to customers no later than 30 days before the proposed transfer;
3. The notice must contain a straightforward description of the transfer, any fees the customer will be expected to pay, a statement of the customer's right to switch to another carrier, and a toll-free number for questions; and
4. The notice and the carrier's description of service to customers must be included in the advice letter.

Applicant provided copies of the notices with the application, and in response to rulings by the assigned administrative law judge (ALJ). The first notice was provided, in writing, more than 30 days before service was to terminate. The notice told customers to take immediate steps to transfer to another carrier, and provided a toll free phone number for questions. The notice did not address any fees that the customer may be expected to pay.[2] However, since Applicant did not intend to charge a fee, Applicant argues that this

[2] In its application, at page 4, Applicant states that its April 3, 2001 notice "contained a statement that FW Anaheim would not impose any fees for the transfer to another carrier." This statement is false. The notice contains no such statement. We remind Applicant that we will not tolerate such attempts to mislead the Commission.

requirement was satisfied. The fourth requirement does not apply to the notice itself. The second notice was almost identical, and was sent 30 days before the new date for service termination. Had Applicant been authorized to discontinue service, the first two notices may have been adequate. However, this was not the case.

GO 96-A, Section XIV, states that "No public utility of a class specified herein shall, unless authority has been obtained from the Commission, either withdraw entirely from public service or withdraw from public service in any portion of the area served." Therefore, Applicant is required to continue to provide service until its withdrawal from service is approved by the Commission.

Applicant's first notice, mailed on April 3, 2001, stated: "This letter is to inform you that due to certain economic and market conditions, effective May 15, 2001, FirstWorld Anaheim and FirstWorld SoCal ("FirstWorld") will no longer be providing services in your area, including T-1, local exchange and / or toll services." Its notice further stated: "We request that you take immediate steps to make arrangements with another local exchange provider or your incumbent local exchange carriers, Pacific Bell or Verizon, as soon as possible to avoid any interruption in your service." The notice indicated that service would cease on May 15, 2001. Therefore, Applicant's April 3, 2001 notice was false because it was not authorized to discontinue service on May 15, 2001. It was misleading because it led customers to believe that they would have to move to another carrier by the specified date, or face service interruption.

Applicant's second notice, mailed on May 15, 2001, was identical to the first notice except that it indicated that service would no longer be provided effective June 16, 2001, and included a different list of alternative carriers. Since Applicant was not authorized to discontinue service on June 16, 2001, this notice too was false and misleading. Given this series of false and misleading notices, we find that Applicant's customers were improperly coerced into moving.

By way of mitigation, Applicant says that once it determined that it needed to discontinue service, it contacted the Commission's staff to determine the proper form its request for service withdrawal should take, but it was not able to get clear direction. On April 3, 2001, it filed an advice letter to discontinue local exchange and interexchange service, and simultaneously sent the first notice to customers. Applicant learned a few days later that it would need to file an application to discontinue local exchange service. Applicant then filed a supplement to the advice letter eliminating the request to discontinue local exchange service. On May 9, 2001, Applicant filed this application.

Applicant sent its first customer notice on the same day it filed the advice letter. The fact that it filed the advice letter demonstrates that it knew, at the time of the first notice, that it needed the Commission's approval. Applicant was aware of GO 96-A, and should have known that the Commission's approval was needed before local exchange service could be discontinued. Since Applicant mailed its second notice after this application was filed, it knew that the Commission's advance approval was needed. The fact that it erroneously filed an advice letter, rather than an application, in no way excuses its actions.

Applicant knew the Commission's approval was needed to withdraw from service, and yet it got rid of its customers by misleading them into transferring to other carriers. Therefore, we find that Applicant used the false and misleading notices to effectively withdraw from service in violation of GO 96-A, Section XIV.

V. Service Interruptions

As discussed above, Applicant suspended the service of three customers for part of a day, on or about June 28, 2001, and notified these customers that it would temporarily reinstate full service once they called back with a service order from another carrier. These service interruptions are especially egregious. These customers could not be required to transfer to another provider because Applicant was not authorized to discontinue service. The fact that they had not responded to Applicant's notices and phone calls regarding transfer to another provider is irrelevant. They had every right to expect service to continue, and did not need to respond. Applicant used service interruptions, when its false and misleading notices failed, to effectively discontinue service to these customers without authorization. In addition, nothing in Applicant's local exchange tariffs allows it to discontinue or suspend service when a customer fails to respond to such a notice. Therefore, Applicant also violated its tariffs.

VI. Restitution to Customers

Applicant asserts that none of its customers was harmed by its actions because all of them transferred to the provider of their choice, and it continued service until the transfers could be completed. However, while the customers in this instance consented to being transferred, this consent was based on Applicant's false and misleading notices. Therefore, we will require Applicant to provide restitution to any customers who were harmed by prematurely switching to another provider.

We will require Applicant to provide written notice to its former customers who switched to another carrier, prior to the effective date of this decision, that they are entitled to request restitution from Applicant. The former customers will be given 20 days following mailing of the notice in which to reply to Applicant. Applicant shall reimburse eligible former customers that respond to the notice for the difference between what they would have paid Applicant, and what they paid their new carrier for comparable replacement service. If the replacement service is materially different from the service formerly provided by Applicant, the restitution shall be calculated using the new provider's rates for services that most closely equate to the formerly provided service, or the rates the customer actually paid to the new provider, whichever is less.

Applicant's customers could not have been required to switch to a new provider before the effective date of this decision. Therefore, the reimbursement shall cover the period beginning with the date the customer terminated Applicant's service, and ending on the effective date of this decision. In addition, we will require that Applicant file a compliance report with the Commission, within 90 days after the effective date of this decision, confirming its compliance with this decision. The report shall include copies of the required notices and the dates they were mailed. It shall also state the number of former customers who applied for restitution, the number who received restitution, and the total amount of restitution. In addition, if Applicant denies restitution to any customers, it shall state for each denied customer why restitution was denied.

This order should be made effective immediately, so that restitution to the affected customers can be made as soon as possible.

VII. Fines

The Commission set the basis for future decisions assessing fines in D.98-12-075, Appendix B. In setting the amount of the fine, the Commission will consider the severity of the offense, the utility's conduct, the utility's financial resources, mitigating or exacerbating factors, and precedent.

The Commission has found that violations of reporting or compliance requirements cause harm to the integrity of the regulatory processes. For example, compliance with Commission directives is required of all California public utilities. Pub. Util. Code § 702 says:

> "Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the Commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public

> utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees."

Such compliance is absolutely necessary to the proper functioning of the regulatory process. For this reason, we may deal severely with the disregard of statutory or Commission directives, regardless of the effect on the public. In this case, Applicant violated GO 96-A, Section XIV as discussed above.

The number of the violations is also a factor in determining the severity of the offence. A series of distinct violations can suggest an on-going compliance deficiency that the utility should have addressed after the first instance. Similarly, a widespread violation that affects a large number of consumers is a more serious offense than one that is limited in scope. In this case, Applicant provided two false and misleading notices to its customers. These constitute two violations of GO 96-A, and Pub. Util. Code § 702, and suggest an ongoing compliance deficiency. In addition, the service interruptions of three customers constitute three distinct violations of the utility's tariffs.

The utility's conduct in (1) preventing the violation, (2) detecting the violation, and (3) disclosing and rectifying the violation is also a factor. Prior to a violation occurring, prudent practice requires that all public utilities take reasonable steps to ensure compliance with Commission directives. The utility should become familiar with applicable laws and regulations and, most critically, regularly review its own operations to ensure full compliance. In this case, Applicant claims it was unaware, when it filed its advice letter, that it had to file an application for approval to discontinue local exchange service. It should have been aware of the requirement. Applicant claims that it did not commit any violations. As discussed above, it did. In addition, it made no attempt to correct its violations in its subsequent notice.

The Commission holds public utilities responsible for their actions. Deliberate as opposed to inadvertent wrongdoing will be considered an aggravating factor. Even if Applicant misunderstood the Commission's requirements at the time it mailed the first notice, it was well aware of them, as evidenced by the filing of this application, before it mailed the second notice. In addition, it should have been aware of its own tariffs when it violated them by interrupting service to its customers. Therefore, we find that Applicant's violations were deliberate.

Effective deterrence requires that the Commission recognize the financial resources of the public utility in setting a fine that balances the need for deterrence with the constitutional limitations on excessive fines. Applicant is a subsidiary of Verado Holdings, Inc. (Verado). The consolidated balance sheet for Verado shows assets of $276 million, and a net loss of $107 million, as of December 31, 2001. Applicant's filings with the Commission report combined financial information. The names of Applicant and its affiliate, FirstWorld SoCal, appeared on the notices. FirstWorld SoCal filed a similar application on the same day this application was filed, using the same outside counsel. Applicant's and Firstworld SoCal's responses to ALJ rulings have been very similar.[3] Therefore, it appears that Applicant's operations are not independent of its affiliates. As a result, it is the parent that must be deterred from wrongdoing. Therefore, for the purpose of assessing a fine, we will consider the parent's financial condition using the reported combined financial statements.

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[3] By an ALJ ruling, the Commission indicated its intent to take official notice of the existence and content of Application 01-05-023 and the responses to ALJ rulings filed in that docket.

Setting a fine at a level that effectively deters further unlawful conduct by the utility and others requires that the Commission also consider facts that tend to mitigate or exacerbate the wrongdoing. In this instance, Applicant claims that it was unaware that it had to file an application to discontinue local exchange service at the time it filed its advice letter and, therefore, at the time it mailed its first notice. Ignorance of a Commission or statutory requirement is a feeble excuse at best. In addition, the fact that Applicant sent a second false and misleading notice, and interrupted service to three customers after it filed this application, and was, therefore, aware of the Commission's requirements, more that offsets any mitigation of its conduct due to ignorance. There is no excuse for Applicant's treatment of its customers in this matter.

The final factor to be considered is precedent. We find two fairly recent decisions to be useful in determining what, if any, fines should be imposed. The first is D.01-06-036. In this decision, we addressed an application by Verizon Select Services, Inc. (VSSI) to transfer its customer base, and to withdraw from providing local exchange service. We determined that VSSI had sent misleading notices to its customers that led them to believe that service would be automatically terminated after a specified date. The notices technically provided disclosure that the withdrawal was subject to Commission approval, but mistakenly left the impression that service would terminate on a specified date in any event. We imposed no fines, but ordered reparations.

The second decision is D.00-12-053. In this decision, the Commission fined Mail.com, Inc. (Mail) and NetMoves Corporation (Net) $5,000 for failing to comply with Pub. Util. Code § 854. Specifically, Mail acquired Net without advance authorization. We found that: (1) the offense was serious but not egregious because no physical or economic harm was done to the customers, and Mail and Net did not benefit from the violation, (2) Mail and Net did not disclose the violation until asked, (3) the violation was unintentional, (4) Mail and Net took steps to remedy the violation once it was discovered, and (5) Mail and Net's regulated revenues for 1999 were approximately $25,000 with equity of $247,000, and a total net loss of $76 million.

Pub. Util. Code § 2107 provides for fines ranging from $500 to $20,000 for each violation of the Public Utilities Code, or Commission decisions, orders or rules. As discussed previously, Applicant effectively withdrew from service through the use of false and misleading notices. Applicant also interrupted service to three customers in violation of its tariffs. Therefore, its violations were more severe than Verizon's. Applicant's violations were worse than Mail and Net's because Applicant's violations were intentional, and Applicant took no steps to remedy them. At the same time, Applicant's parent's financial condition is generally comparable to Mail and Net's. Therefore, we will impose a fine of $6,000 for each of the two false and misleading notices. Since only one customer was affected by each of the three service interruptions, we will impose a lesser fine of $2,000 each. The total fine is, therefore, $18,000.

VIII. CPCN Revocation

In this application, Applicant asks to relinquish its CPCN. Given Applicant's actions as described above, we will revoke Applicant's CPCN.

IX. Procedural Matters

In Resolution ALJ 176-3063 dated May 14, 2001, the Commission preliminarily categorized this application as rate setting, and preliminarily determined that hearings were not necessary. No protests have been received. There is no apparent reason why the application should not be granted. Given these developments, a public hearing is not necessary, and it is not necessary to disturb the preliminary determinations.

X. Comments on the Proposed Decision

The draft decision of the ALJ in this matter was mailed to Applicant (there are no other parties) in accordance with Pub. Util. Code § 311(g)(1), and Rule 77.7 of the Commission's Rules of Practice and Procedure.

Findings of Fact

1. The application appeared in the Daily Calendar on May 11, 2001.

2. No protests have been filed.

3. Applicant was authorized in D.96-11-011 and D.97-02-039 to provide facilities-based and resold local exchange and interexchange services.

4. On April 3, 2001, Applicant filed Advice Letter 84 requesting authority to withdraw from providing local exchange and interexchange service.

5. On April 16, 2001, Applicant supplemented Advice Letter 84 by Advice Letter 84-A that revised the filing to address only interexchange service.

6. On April 3, 2001, Applicant mailed a notice its customers stating that service would cease on May 15, 2001.

7. On May 15, 2001, Applicant mailed a notice its customers stating that service would cease on June 16, 2001.

8. On or about June 28, 2001, Applicant suspended service (except 911 and 611) for part of a day to its three remaining customers, and informed them that service would be temporarily reinstated when they called back with a service order from another provider.

9. The notice requirements in D.97-06-096 for advice letter filings are useful as a guide in this proceeding.

10. Applicant's statement in its application that its April 3, 2001 notice contained a statement that " FW Anaheim would not impose any fees for the transfer to another carrier" is false.

11. Applicant's April 3 and May 15, 2001 notices did not satisfy the notice requirements in D.97-06-096 because Applicant was not authorized to discontinue service on the dates specified in the notices.

12. Pursuant to GO 96-A, Section XIV, Applicant is required to continue to provide local exchange service until its withdrawal is approved by the Commission.

13. Applicant's April 3 and May 15, 2001 notices state that service will be discontinued on the dates specified therein, and do not indicate that Applicant may not discontinue service unless and until its request is approved by the Commission.

14. Applicant's customers were harmed because they were deliberately misled into transferring to other carriers.

15. Nothing in Applicant's tariff allows it to discontinue or suspend service when a customer fails to respond to a notice.

16. The two false and misleading notices constitute two violations of GO 96-A. Section XIV, and Pub. Util. Code § 702, and suggest an ongoing compliance deficiency.

17. The service interruptions of three customers constitute three violations of Applicant's tariffs.

18. Applicant made no attempt in its second notice to correct the violations in its first notice.

19. Applicant's violations of GO 96-A, Section XIV, Pub. Util. Code § 702, and its tariffs were deliberate.

20. Applicant's filings with the Commission report combined financial information.

21. The name of Applicant and its affiliate, FirstWorld SoCal, appeared on the first two notices.

22. FirstWorld SoCal filed a similar application on the same day this application was filed, using the same outside counsel.

23. Applicant's and Firstworld SoCal's responses to ALJ rulings are very similar.

24. Applicant's operations are not independent of its affiliates.

25. The parent must be deterred from wrongdoing.

26. Applicant's violations were more severe than Verizon's violations addressed in D.01-06-036 because it withdrew from service through the use of false and misleading notices, and interrupted service to three customers.

27. Applicant's violations were worse than Net and Mail's violations addressed in D.00-12-053 because its violations were intentional, and it took no steps to remedy them.

28. Applicant's parent's financial condition is generally comparable to Net and Mail's.

Conclusions of Law

1. A hearing is not necessary.

2. Applicant's April 3 and May 15, 2001 notices are false and misleading.

3. Applicant could and should have known that it needed the Commission's approval before it could discontinue local exchange service.

4. Applicant's notices were intended to mislead its customers into transferring to other carriers.

5. On or about June 28, 2001, Applicant violated its tariffs when it suspended service (except 911 and 611) for part of a day to the three remaining customers, and informed them that service would be reinstated when they called back with a service order from another provider.

6. Applicant's former customers could not have been required to switch to another carrier prior to the effective date of this decision.

7. Applicant effectively withdrew from providing local exchange service to its customers without the Commission's advance approval in violation of GO 96-A Section XIV, and Pub. Util. Code § 702.

8. Applicant should provide restitution to customers who were harmed by prematurely switching to another carrier.

9. The amount of the restitution to each customer should be the difference between what the customer would have paid Applicant for the services to which he or she subscribed, and the amount he or she actually paid to the new carrier for comparable services.

10. Restitution should be provided for the period beginning when the customer signed on with the new carrier, and ending on the effective date of this decision.

11. Applicant should be ordered to file a report with the Commission, within 90 days after the date it is authorized to terminate service pursuant to this decision, confirming its compliance with this decision.

12. For the purpose of assessing a fine, the parent's financial condition should be considered using the reported combined financial statements.

13. Applicant should be fined $18,000.

14. Applicant's CPCN should be revoked after it has fully complied with this decision.

15. This order should be made effective immediately, so that restitution to the affected customers can be made as soon as possible.

ORDER

IT IS ORDERED that:

1. The application of FirstWorld Anaheim (Applicant) to withdraw from the provision of local exchange service is granted to the extent set forth below.

2. Applicant shall provide written notice to its former customers who transferred to another carrier after April 3, 2001 and prior to the effective date of this decision, that they are entitled to request restitution from Applicant.

3. The former customers shall be given 20 days, following the mailing of the notices, in which to reply to Applicant requesting restitution.

4. Applicant shall reimburse the former customers, who transferred to another carrier after April 3, 2001 and who respond to the notice, for the difference between what they would have paid Applicant, and what they paid their new carrier for comparable replacement service.

5. If the replacement service is materially different from the service formerly provided by Applicant, restitution shall be calculated using the new provider's rates for services that most closely equate to the formerly provided service, or the actual rates the customer paid to the new provider, whichever is less.

6. The reimbursement shall cover the period between the date the customer terminated Applicant's service, and the effective date of this decision.

7. Applicant shall file a compliance report in this docket, with a copy to the director of the Commission's Telecommunications Division, within 90 days after the effective date of this decision.

8. The compliance report shall include; (1) copies of the required notices and the dates they were mailed, (2) the number of former customers eligible to claim restitution, (3) the number who applied, (4) the number who received restitution, (5) the total amount of restitution, and (6) an explanation of each instance where a former customer who requested restitution was denied restitution.

9. Applicant shall pay a fine of $18,000 payable to the California Public Utilities Commission for deposit to the General Fund, and shall remit said payment to the Commission's fiscal office within 30 days of the effective date of this order.

10. Applicant shall not accept new customers.

11. Applicant's certificate of public convenience and necessity is revoked effective the date Applicant has fully complied with this order.

12. This application is closed.

This order is effective today.

Dated ____________________, at San Francisco, California.